Supreme Court, U.S.
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No. 10-716

In the
Supreme Court of the United States

AMY MALDONADO,

Petitioner,

v.

LOGLOGIC, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., provides that it is "an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to h[er] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[.]" 42 U.S.C. § 2000e-2(a)(1). The Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), defined the terms "because of sex" or "on the basis of sex" to include "because of or on the basis of pregnancy[.]" 42 U.S.C. § 2000e(k). The questions presented are:

1. Whether an employee alleging intentional discrimination must present sufficient evidence to disprove an employer's nondiscriminatory justification for termination in order to successfully oppose summary judgment.

2. Whether a reasonable jury may draw an inference of intentional discrimination from sufficient evidence that an employee was not responsible for the act supporting the employer's nondiscriminatory justification.

3. Whether a reasonable jury may draw an inference of intentional discrimination from sufficient evidence that an employee was treated differently than other similarly situated, nonprotected employees subject to the same performance standards.

PARTIES TO THE PROCEEDING

Petitioner Amy Maldonado is an individual resident of the Commonwealth of Virginia and was the appellant in the court of appeals.

LogLogic, Inc. is a privately-held company incorporated in Delaware with its headquarters in San Jose, California, and was the appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Amy Maldonado, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The amended per curiam opinion of the court of appeals (App., *infra*, 1a), was not reported. The original per curiam opinion of the court of appeals (*id.* at 6a), was not reported, but is available at 2010 U.S. App. LEXIS 13678 (July 2, 2010). The opinion of the district court (App., *infra*, 11a) was reported at 632 F. Supp. 2d 1 (July 14, 2009).

JURISDICTION

The court of appeals issued a per curium judgment on July 2, 2010. App., *infra*, 6a. The court issued an order denying the petitions for rehearing and rehearing en banc, and amending judgment on September 1, 2010. *Id.* at 25a-28a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions, 42 U.S.C. § 2000e(k) and 42 U.S.C. § 2000e-2(a), are reproduced in the Appendix to the Petition. App., *infra*, 30a-31a.

STATEMENT OF THE CASE

1. Congress enacted Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, Section 703(a)(1) to provide that it is "an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to

h[er] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex[.]" 42 U.S.C. § 2000e-2(a)(1); App., *infra*, 30a-31a.

The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, defined the terms "because of sex" to include "because of or on the basis of pregnancy[.]" 42 U.S.C. § 2000e(k); App., *infra*, 30a.

2. LogLogic is a provider of data security appliances and services. App., *infra*, 2a. The company hired Amy Maldonado as its first Director of Federal Sales in December of 2004. C.A. J.A. 235, 282. She was also responsible for the mid-Atlantic region. *Id.* at 217. In 2005, Maldonado was the only female of the ten regional account managers employed by LogLogic. *Id.* at 282. Maldonado reported directly to Alan Hahn, Vice President for Worldwide Sales. *Id.* at 211, 213.

In late September, 2005, Maldonado notified Hahn that she was pregnant and needed a few hours off during the last week of September to have a sonogram. *Id.* at 239. Hahn seemed shocked by that news. *Id.* at 240.

On October 5, 2005, Hahn placed Maldonado on a Performance Improvement Plan ("PIP") because her sales did not meet quota. *Id.* at 69, 95-96. The PIP required Maldonado to close $100,000 in sales in each of the three months of October, November, and December of 2005. *Id.* at 306-07. Prior to her PIP placement, Hahn did not raise any concerns regarding her job performance. *Id.* at 241, 308. Although Hahn claimed that he was not informed of her pregnancy prior to PIP placement, *id.* at 308,

Maldonado stated that she informed him in late September prior to her first sonogram, *id.* at 239.

On November 2, 2005, Hahn changed the terms of the PIP and informed Maldonado that she had until the end of November to make sales totaling $200,000 for October and November or she would be terminated. *Id.* at 155, 169, 316.

On November 3, 2005, Hahn flew to Washington, D.C. to attend a meeting with Maldonado, a male sales engineer named Fabricio Fermin, and several Department of Energy ("DOE") representatives. *Id.* at 250-51, 253-54, 276-77. Prior to the meeting, Fermin informed Maldonado, who then informed Hahn, that the Chief Information Officer ("CIO") of DOE would be present at the meeting. *Id.* at 198-99. Hahn decided to attend the meeting prior to knowing that the CIO, who did not have any budgetary power, would be present. *Id.* at 199, 252. Hahn was aware that Fermin scheduled the meeting with his DOE contacts. *Id.* at 149-51. Fermin told Hahn that he was responsible for the meeting's logistics. *Id.* at 161. In fact, Fermin emailed Hahn and Maldonado to confirm the meeting. *Id.* at 315. Maldonado and Hahn presented contradictory statements as to whether Hahn had asked Maldonado to confirm the CIO's attendance. *Id.* at 199, 229-30. And Maldonado stated that Hahn was not informed of the CIO's presence prior to his decision to attend the meeting. *Id.* at 199. The CIO did not attend the meeting. *Id.* at 277.

Later that afternoon, Hahn sent Maldonado an email stating: "You stated we had a meeting with the CIO of Department of Energy and in fact we did not. This was a waste of my time flying across the

country and a waste of company resources." *Id.* at 317.

On November 4, 2005, Hahn fired Maldonado. *Id.* at 156, 285. Hahn then unofficially assigned Fermin to Maldonado's territory and instructed him to close her pending deals. *Id.* at 318. More than $300,000 in sales closed in Maldonado's territory during the fourth quarter of 2005, the same time period covered by her PIP. *Id.* at 199-200.

Two male sales representatives initially placed on the same PIP at the same time as Maldonado were not terminated by Hahn at any point during the PIP period or at the end of the PIP period in December 2005 even though their sales were below the PIP quota. *Id.* at 146, 152-54, 172-73, 220, 226. Neither male employee was placed on an expedited PIP plan requiring sales to be closed by the end of November 2005. One of the male employees was terminated in February 2006. *Id.* at 205, 215. The other male employee was not terminated by Hahn. *Id.* at 226.

LogLogic asserted two non-discriminatory reasons for terminating Maldonado. First, "LogLogic terminated Maldonado because of her poor performance." C.A. Appellee Br., at 11. Second, LogLogic "terminated Maldonado because of her failure to confirm the attendance of the CIO at the November 3, 2005 meeting." *Ibid.*

3. On January 12, 2007, Maldonado filed a complaint against LogLogic in the United States District Court for the District of Columbia. C.A. J.A. 2. On June 26, 2007, Maldonado filed a second amended complaint. *Id.* at 8-19. Maldonado alleged that she was discriminatorily terminated on the basis of her pregnancy, that LogLogic breached its

contract with her by failing to pay her commissions due under her compensation plan, and that LogLogic breached the covenant of good faith and fair dealing by firing her in bad faith to frustrate her legitimate expectation of contractual benefits. *Ibid*; App., *infra*, 13a, 19a-21a.

On February 13, 2009, LogLogic moved for summary judgment on Maldonado's remaining claims. App., *infra*, 11a; C.A. J.A. 6. On July 14, 2009, the District Court entered an order granting LogLogic's motion in its entirety. App., *infra*, 11a-24a. On August 10, 2009, Maldonado timely appealed to the United States Court of Appeals for the District of Columbia Circuit. C.A. J.A. 7.

4. On July 2, 2010, the District of Columbia Circuit issued a per curiam opinion reversing the district court on a breach of contract issue and affirming in all other respects. App., *infra*, 6a-10a.

The court of appeals concluded that Maldonado's Title VII claim did not survive summary judgment because she did not present evidence that "substantially undermines" LogLogic's two proffered grounds for termination. *Id.* at 9a.[1] The court concluded that Maldonado did not factually "disprove" the employer's reasons, and that she

[1] The panel misidentified one of the grounds as "Maldonado's failure to confirm a sales meeting with a client" (App., *infra*, 4a, 9a), when, in fact, LogLogic's stated reason was that Maldonado did not "confirm the attendance of the CIO at the November 3, 2005 meeting." C.A. Appellee Br., at 11. The sales meeting was confirmed and held, and the other party, the Department of Energy, was not a client, but a prospective client.

"fail[ed] to carry her burden" because "[s]he does not identify any factual inaccuracy accompanied by a suspicion of mendacity" in the asserted grounds. *Ibid.*

Maldonado argued in a petition for rehearing and a petition for rehearing en banc that the standard of summary judgment requiring Maldonado to "substantially undermine[]" and "disprove" LogLogic's reasons conflicted with the standard of review identified by this Court and other courts of appeals. C.A. Pet'n Panel Reh'g & Reh'g E.B., at 5-6. Maldonado also argued that the panel created an improper burden of proof under Title VII by requiring plaintiffs to identify a "factual inaccuracy accompanied by a suspicion of mendacity" in an employer's non-discriminatory justification to survive summary judgment. *Id.* at 9-10. Finally, Maldonado argued that she presented genuine issues of material fact on each of LogLogic's purported non-discriminatory justifications to survive summary judgment. *Id.* at 11-15.

5. On September 1, 2010, the court of appeals issued an order denying the petitions for rehearing and rehearing en banc. App., *infra*, 25a-29a. However, the court also issued an order amending its judgment and opinion of July 2, 2010. *Id.* at 25-27a. The court revised the section discussing Maldonado's Title VII claim. *Id.* at 26a. The court removed the original language requiring Maldonado to identify a "factual inaccuracy accompanied by a suspicion of mendacity" but left intact its requirement that Maldonado must "disprove" LogLogic's non-discriminatory reasons in order to survive summary judgment. *Ibid.*

REASONS FOR GRANTING THE PETITION

First, the District of Columbia Circuit has held that an employee must affirmatively disprove an employer's non-discriminatory justification for termination to survive summary judgment. The ruling conflicts directly with Supreme Court precedent permitting the employee to establish pretext by presenting sufficient evidence, in any number of forms, that the employer's reason is unworthy of credence. The holding also deepens a conflict among the Circuit Courts of Appeals over the type and quantum of proof needed to survive summary judgment.

Second, the court of appeals held that an employee who presents sufficient evidence that she was not responsible for the alleged misdeed justifying termination cannot survive summary judgment. The ruling conflicts squarely with *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 145 (2000), which held that summary judgment was inappropriate where petitioner introduced evidence "cast[ing] doubt on whether he was responsible for" the act allegedly underlying his termination.

Third, the court of appeals held that an inference of intentional discrimination could not be drawn from sufficient evidence that similarly situated, nonprotected employees who violated work rules of comparable seriousness were not terminated. The holding conflicts with the guiding principles of law articulated in this Court's employment discrimination cases and the holdings of other Circuit Courts of Appeals.

The Court should therefore grant certiorari to review the court of appeals' decision.

I. The Court of Appeals' Holding that Maldonado Must Disprove LogLogic's Nondiscriminatory Justification Conflicts with this Court's Precedents and Further Deepens an Existing Circuit Conflict

1. The court of appeals' holding that an employee must affirmatively "disprove" an employer's purportedly nondiscriminatory reasons for termination to demonstrate that the reasons were a pretext for intentional discrimination cannot be reconciled with this Court's precedents, which permit an employee to show through indirect evidence that the employer's reasons are unworthy of credence in any number of ways.

a. Under the well-established legal framework for allocating the burden of production and the order for the presentation of proof in employment discrimination cases, an employee is initially required to present a prima facie case of employment discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). An employer may then rebut the employee's prima facie case by producing legitimate, nondiscriminatory reasons for the adverse employment action. *Id.* at 803. The employee is then "afforded a fair opportunity to show" that an employer's stated reasons were "in fact pretext" for intentional discrimination, *id.* at 804, or were "not its true reasons" for termination, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993) (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)); *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989). At all times, the employee maintains the ultimate

burden of persuasion that she was the victim of intentional discrimination. *St. Mary's Honor Ctr.*, 509 U.S. at 511.

To demonstrate that an employer's stated reasons were a pretext for intentional discrimination, the employee is not required "to submit direct evidence of discriminatory intent." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3, 717 (1983). An employee may also introduce indirect evidence of an employer's discriminatory intent by showing that the employer's purported justifications are "unworthy of credence." *Reeves v. Sanderson*, 530 U.S. 133, 143 (2000) (quoting *Burdine*, 450 U.S. at 256). To demonstrate pretext, an employee is "not limited to presenting evidence of a certain type," *Patterson*, 491 U.S. at 187, because such "evidence might take a variety of forms," *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978).

In *St. Mary's Honor Center*, the Court held that "[i]t is not enough . . . to *dis*believe the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." 509 U.S. at 519. The Court concluded that although "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination," it does not necessarily compel a finding of discrimination. *Id.* at 511. Nevertheless, the Court held that a factfinder may "infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Id.* at 511.

In *Reeves*, the Court addressed whether an employer is entitled to judgment as a matter of law when an employee presents exclusively a prima facie case of discrimination and sufficient evidence to

disbelieve an employer's nondiscriminatory explanation. *Id.* at 137. The Court re-affirmed that the factfinder was permitted to infer intentional discrimination based on evidence of a prima facie case as well as evidence discrediting the employer's reasons. *Id.* at 146-49. In applying its conclusion to the facts of the case, the Court concluded that petitioner "made a substantial showing that respondent's explanation was false" by presenting evidence "cast[ing] doubt on" and "undermining" the employer's reasons. *Id.* at 144-45, 152.

Reeves was concerned with the type of "evidentiary burden borne by plaintiffs", *id.* at 146, but did not expound upon the quantum of evidence necessary to constitute "sufficient evidence for a reasonable factfinder to reject [an employer's] nondiscriminatory explanation." *Id.* at 140. *Reeves* instructed that judgment in an employer's favor is appropriate only when the record has "conclusively revealed" a nondiscriminatory reason or when a plaintiff presents a "weak issue of fact . . . and . . . abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* at 148. The Court broadly explained that the entry of judgment "will depend on a number of factors," including the strength of the prima facie case and the "probative value of the proof that the employer's explanation is false". *Id.* at 148-49. However, the Court was careful to limit the scope of its holding, explaining that it "need not – and could not – resolve all of the circumstances in which such factors would entitle an employer to judgment as a matter of law." *Id.* at 149. Applying the above legal principles to the facts of the case, the Court concluded that the court of appeals erred by "disregard[ing] critical evidence

. . . undermining respondent's nondiscriminatory explanation", *id.* at 152, and that petitioner had "creat[ed] a jury issue as to the falsity of the employer's explanation." *Id.* at 151.

Because neither *Reeves* nor *Hicks* involved a review of a summary judgment, this Court's summary judgment precedents are instructive to the instant question presented.[2] An employee opposing summary judgment does not bear the ultimate burden of "conclusively" proving her case by the preponderance of the evidence. *First Nat'l Bank of Am. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968). She must only produce "sufficient evidence supporting the claimed factual dispute" (*ibid.*), "from which a jury might return a verdict in h[er] favor," *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986); *see also* Fed. R. Civ. P. 56(c)(2) (2010). The employee's claims must be "plausible," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596 (1986), and "sufficiently unambiguous," *id.* at 597. And the facts "must be viewed in the light most favorable to the nonmoving party[.]" *Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). Summary judgment is appropriate only when the evidence "unmistakably favors one side or the other," *Anderson*, 477 U.S. at 252, or when "there can be but one reasonable conclusion," *id.* at 250. But when

[2] *Reeves* reviewed a motion for judgment as a matter of law under Fed. R. Civ. P. 50. 530 U.S. at 150. The Court did state, however, that the "standard for granting summary judgment mirrors the standard for granting judgment as a matter of law, such that the inquiry under each is the same[.]" *Ibid.*

"reasonable minds could differ as to the import of the evidence," summary judgment is inappropriate. *Id.*

b. The court of appeals' decision that Maldonado was required to affirmatively "disprove" LogLogic's purportedly non-discriminatory justifications conflicts with these well-established principles of employment and summary judgment law.

First, the court of appeals' holding conflicts with this Court's statements that Maldonado was permitted to utilize any number of different methods to prove that LogLogic's reasons were unworthy of credence, *Reeves*, 530 U.S. at 143, and that she "may not be forced to pursue any particular means for demonstrating . . . pretext." *Patterson*, 491 U.S. at 188. In *Patterson*, for example, the Court concluded that the district court erred by instructing the jury that petitioner, who was a minority, "could carry her burden of persuasion only by showing that she was in fact better qualified than" the Caucasian applicant hired for the position. *Ibid.*

Maldonado was not required to affirmatively disprove LogLogic's nondiscriminatory justification. She was simply required to provide sufficient direct or indirect evidence that LogLogic's nondiscriminatory justification was a pretext for intentional discrimination.

The court of appeals' holding improperly and overly limited an inference of intentional discrimination to those rare situations where an employee can factually disprove an employer's stated reasons at summary judgment. Under this Court's precedents, Maldonado was permitted to – and indeed did – introduce evidence that the purported reasons were unworthy of credence, not by

presenting evidence that they were factually incorrect (for example, that her sales were above target or that she did in fact secure the CIO's presence at the meeting), but by showing, for example, that other similarly situated employees were not terminated and that she was not actually responsible for the prospective client's non-attendance. Maldonado cannot be punished for choosing not to pursue a particular evidentiary method of proving pretext.

Second, the court of appeals' requirement that Maldonado disprove LogLogic's reasons for termination improperly required her to meet her ultimate burden of persuasion to prove her case of intentional discrimination "by a preponderance of the evidence", *Burdine*, 450 U.S. at 253, outright at summary judgment. At summary judgment, Maldonado was not required to "conclusively" prove her case. *Cities Service Co.*, 391 U.S. at 288-89. Rather, Maldonado need only have "creat[ed] a jury issue as to the falsity of the employer's explanation." *Reeves*, 530 U.S. at 151.

There is no support in this Court's holdings for the principle of law articulated in *Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008), and relied upon by the court of appeals below (App., *infra*, at 4a), that summary judgment is appropriate when "the employer's stated belief about the underlying facts is reasonable in light of the evidence." That principle of law misstates the appropriate test, which views the evidence in the light most favorable to the non-movant and asks whether the employer's stated justification is unworthy of credence, *Reeves*, 530 U.S. at 143 (quoting *Burdine*, 450 U.S. at 256), not whether it is

based in reason. It is "generally assume[d]" the employer "acts with *some* reason". *Furnco*, 438 U.S. at 577. The appropriate question is whether the employer "based [its] decision on an impermissible consideration." *Ibid.*

Here, Maldonado introduced sufficient evidence for a reasonable jury to infer a case of intentional discrimination. She presented sufficient evidence that plausibly and unambiguously called into question and undermined LogLogic's two proffered reasons for termination. First, with regard to LogLogic's justification that Maldonado's sales fell below pre-determined targets, Maldonado presented evidence that two other male employees placed on a performance-improvement-plan ("PIP") were not discharged after their sales fell below pre-determined targets. C.A. J.A. 146, 152-54, 172-73. Neither employee reached $300,000 in sales during the PIP period from October through the end of December 2005 or was fired after the first month of PIP. *Id.* at 205, 216, 226, 319. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) (evidence that similarly situated employees are treated differently is "[e]specially relevant" to determining pretext). Perhaps more importantly, Maldonado's supervisor terminated her in early November despite explicitly informing her that she had until the end of November to reach a sales target. C.A. J.A. 155-56, 169, 285, 316. Thus, the credibility of the supervisor's purported justification – that Maldonado's sales were below target – was significantly called into question because he did not honor the terms of his own agreement giving Maldonado until the end of November to meet her quota.

With regard to LogLogic's second reason that Maldonado failed to confirm the attendance of the CIO at a meeting, she presented testimony from a co-worker that he was responsible for arranging the meeting and that Maldonado's supervisor, who terminated her, knew it. *Id.* at 149-51, 161. The supervisor even conceded that he knew the co-worker was arranging the meeting, yet instead of firing the co-worker, he fired Maldonado, and replaced her with him. *Id.* at 149-51. The record also reflects contradictory testimony as to whether the supervisor knew that the key individual would be at the meeting. *Id.* at 199, 229-30.

Finally, Maldonado presented other evidence of intentional discrimination as well as a strong prima facie case. Maldonado testified that her supervisor was shocked when she informed him of her pregnancy. *Id.* at 240. Maldonado was the only female account manager when she was hired. *Id.* at 282. And only five percent of the work force was female when she was hired. *Ibid.* Based on this record, it cannot be said that LogLogic's reasons "so overwhelmed the evidence favoring [Maldonado] that no rational trier of fact could have found" that she was the victim of intentional discrimination. *Reeves*, 530 U.S. at 153.

2. The court of appeals' holding that an employee must affirmatively "disprove" an employer's purportedly nondiscriminatory reasons to permit an inference of intentional discrimination conflicts with the holdings of other courts of appeals, which are divided over the quantum of proof needed to demonstrate pretext at summary judgment.

The courts of appeals for the Third, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have specifically rejected the District of Columbia Circuit's overly narrow approach. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994) (rejecting "extreme position[]" that a "plaintiff must adduce evidence directly contradicting the defendant's proffered legitimate explanations"); *Blair v. Henry Filters, Inc.*, 505 F.3d 517, 532 (6th Cir. 2007) ("to survive summary judgment a plaintiff need only produce enough evidence to support a prima facie case and to rebut, but not to disprove, the defendant's proffered rationale"); *O'Bryan v. KTIV Television*, 64 F.3d 1188, 1192 (8th Cir. 1995) (rejecting "narrow approach" that summary judgment only appropriate where plaintiff "unable to directly disprove her employer's proffered reason"); *Buettner v. Eastern Arch Coal Sales Co.*, 216 F.3d 707, 717 (8th Cir. 2000) (to survive summary judgment, plaintiff "must adduce enough admissible evidence to raise genuine doubt as to the legitimacy of a defendant's motive, even if that evidence does not directly contradict or disprove a defendant's articulated reasons for its actions"); *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1170-72 (9th Cir. 2007) (district court improperly imposed "higher burden of proof" that employer reasons were "false" and that intentional discrimination was "real reason") *Jones v. Unisys Corp.*, 54 F.3d 624, 632 (10th Cir. 1995) ("Plaintiffs need not disprove defendant's reasons . . . ."); *Chapman v. Al Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000) (en banc).

These – and other – courts of appeals have required employees to present something less than disproof or contradiction of an employer's

nondiscriminatory reasons to survive summary judgment. For example, the Sixth Circuit, Tenth Circuit and Eleventh Circuit, sitting en banc, have explained that an employee need only present sufficient evidence to rebut the employer's argument. See *Blair*, 505 F.3d at 532; *Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1169 (10th Cir. 2007) (summary judgment appropriate where employer's explanations "remain unrebutted and the employer's credibility has not been so damaged as to render such explanations suspect"); *Chapman*, 229 F.3d at 1030 ("an employee must meet [the employer's nondiscriminatory] reason head on and rebut it[.]"). The Third Circuit, in adopting a self-described middle-approach, requires that "to avoid summary judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that" the employer's nondiscriminatory reasons were "either a post hoc fabrication or otherwise did not actually motivate the employment action." *Fuentes*, 32 F.3d at 764. The Ninth Circuit requires the employee to produce "specific, substantial evidence of pretext," *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983), that is "sufficiently probative", *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1997). The First Circuit requires the employee to "adduce[] minimally sufficient evidence" of pretext. *Davila v. Corporacion de P.R. para la Difusion Publica*, 498 F.3d 9, 16 (1st Cir. 2007).

The courts of appeals for the Fifth and Seventh Circuits, however, have adopted the District of Columbia's approach with little to no explanation. *See Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 325 (5th Cir. 2002) (affirming grant of summary

judgment where appellant "produced no evidence to disprove [employer's] legitimate non-discriminatory justification"); *Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216, 1220 (7th Cir. 1991) (plaintiff "required to disprove each of" employer's explanations).

In any event, the courts of appeals have consistently reached different conclusions on the quantum of proof necessary to demonstrate pretext and survive summary judgment.

3. The Court should grant certiorari to decide a question that has divided and confounded the courts of appeals for nearly twenty years. Although decided at summary judgment, this case provides an unusually good vehicle for review because the factual record is well developed on the material issue of LogLogic's purportedly nondiscriminatory justifications for termination. Both parties have presented admissible documentary and testimonial evidence in support of their contentions. In addition, the primary question presented involves the broader issue of the quantum of proof necessary to demonstrate pretext and to create a permissible inference of discrimination at summary judgment. Yet this case provides a sound vehicle for the Court, should it so choose, to address one or both of the following more specific ancillary questions of law. *See infra*, Parts II-III.

II. The Court of Appeals' Holding that Intentional Discrimination Could Not Be Inferred from Evidence that Maldonado Was Not Responsible for the Act Underlying Her Termination Conflicts Directly with the Holding in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000)

1. The Court of Appeals' holding that a reasonable jury could not infer that LogLogic's justification was unworthy of credence or that Maldonado was the victim of intentional discrimination from sufficient evidence that she was not responsible for the act purportedly underlying her termination cannot be reconciled with this Court's precedent.

Reeves held that summary judgment was inappropriate where petitioner introduced evidence "cast[ing] doubt on whether he was responsible for" the act allegedly underlying his termination. 530 U.S. at 145. The employer argued that petitioner was terminated in part because he was responsible for disciplining late and absent employees. *Id.* At trial, however, a co-worker admitted that he, "and not petitioner, was responsible for citing employees for violations of the company's attendance policy." *Id.* The Court concluded that this, along with other probative, evidence "was sufficient evidence for the jury to find that respondent had intentionally discriminated." *Id.* at 153-54.

2. The court of appeals did not apply *Reeves*' holding in concluding that Maldonado did not produce evidence that "would permit a reasonable

jury to question" LogLogic's assertion that "she failed to confirm the sales meeting." App., *infra*, 4a. *Reeves* squarely held that evidence showing that Maldonado was not responsible for the act purportedly underlying termination was relevant to and may support an inference that LogLogic's justification was unworthy of credence or that she was the victim of intentional discrimination.

The court of appeals' refusal to credit such evidence also conflicts with this Court's teachings that an employee opposing summary judgment is "not limited to presenting evidence of a certain type" and "may not be forced to pursue any particular means for demonstrating . . . pretext." *Patterson*, 491 U.S. at 187-88. The employee need only present "competent evidence" that "might take a variety of forms". *Furnco*, 438 U.S. at 578. Evidence that an employee was not responsible for the underlying act is one such form. *Reeves*, 530 U.S. at 145.

Here, Maldonado introduced sufficient evidence that she was not responsible for the underlying act purportedly justifying LogLogic's decision to terminate her. Maldonado presented testimony from a co-worker that he was responsible for arranging the meeting. C.A. J.A. 149-51, 161. And she introduced contradictory testimony from the supervisor and herself on the question of whether he had asked her to confirm the CIO's presence. *Id.* at 199, 229-30. This evidence, in combination with other evidence of intentional discrimination and a strong prima facie case, was enough to survive summary judgment.

In fact, the permissible inference of intentional discrimination that can be drawn from Maldonado's

evidence is even stronger than the inference in *Reeves* because she presented deposition testimony from her terminating supervisor that he knew that a co-worker arranged the meeting (*id.* at 149-51), and presented deposition testimony from the co-worker that he told the supervisor he was responsible for arranging it (*id.* at 161). Thus, on this record, the evidence to question whether LogLogic's belief was genuinely held was more than sufficient. See *Courtney v. Biosound, Inc.*, 42 F.3d 414, 423 (7th Cir. 1994); *Kendrick v. Penske Transp. Servs.*, 220 F.3d 1220, 1231 (10th Cir. 2000).

III. The Court of Appeals' Holding that Intentional Discrimination Could Not Be Inferred from Evidence that LogLogic Treated Differently Male Employees Subject to the Same Performance Standards Conflicts with this Court's Precedent and Creates a Circuit Conflict

The Court of Appeals' holding that a reasonable jury could not infer that LogLogic's justification was unworthy of credence or that Maldonado was the victim of intentional discrimination from sufficient evidence that two other male employees under the same performance improvement plan ("PIP") were treated differently cannot be reconciled with this Court's precedent.

Nearly three decades ago, this Court first held that evidence that a similarly situated employee was treated differently was "'[e]specially relevant' to demonstrating pretext and a permissible inference of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). Employers may lawfully

terminate an employee who violates a job requirement or expectation, but "only if this criterion is applied alike to member of all [sexes]." *Ibid.* Evidence that an employer has applied an employment criterion differently to different employees not only may establish that the employer's reason for termination "was a pretext," but that the employer was "discriminatory in its application." *Id.* at 806.

McDonnell Douglas and its progeny have not addressed when an employer's disparate treatment of its employees subject to the same performance standards may create a permissible inference of unlawful sex discrimination. However, the Courts of Appeals have adopted a rather straight-forward approach precluding employers from applying such standards differently on the basis of an employee's sex.

The use of employment standards may create a permissible inference of a pretext for discrimination when they are "not uniformly followed." *Overgard v. Cambridge Book Co.*, 858 F.2d 371, 376 (7th Cir. 1988). A plaintiff may demonstrate pretext "by providing evidence that [s]he was treated differently from other similarly situated, nonprotected employees who violated work rules of comparable seriousness," so long as the employees "share[] the same supervisor, [are] subject to the same performance standards, and otherwise face[] comparable relevant employment circumstances." *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 489 (10th Cir. 2006) (citation omitted).

Here, two male employees placed on the same PIP at the same time as Maldonado were not

terminated during or upon completion of the PIP period after they failed to meet the expected sales quotas. C.A. J.A. 146, 152-54, 172-73. These employees also failed to meet similar PIP goals, and the same supervisor did not terminate them. *Id.* 205, 212-16, 226, 319. One of the males was later terminated in February 2006 despite failing to meet the PIP goals established for the end of December 2005. *Id.* at 205, 215.

Moreover, although Maldonado's supervisor initially placed her on a PIP requiring her to close $100,000 in sales in each of the three months of October, November and December of 2005 (C.A. J.A. 306-07), on November 2, 2005, he informed her that she had until the end of November to make sales totaling $200,000 for October and November or she would be terminated (*id.* at 155, 169, 316). Neither male employee was placed on an expedited PIP. And the supervisor terminated Maldonado two days later on November 4, 2010. *Id.* at 156, 285. LogLogic thus failed to honor the express terms of the PIP giving Maldonado until the end of November to close the sales.

Overall, a reasonable jury could infer from this evidence that LogLogic's purported justification was a pretext for intentional discrimination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 29, 2010

APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2009

No. 09-7087

[Filed July 2, 2010]

AMY MALDONADO, APPELLANT)
)
v.)
)
LOGLOGIC, INC., APPELLEE)
)

Appeal from the United States District Court
for the District of Columbia
(No. 1:07-cv-00066-RCL)

Before: GINSBURG, BROWN, and KAVANAUGH, *Circuit Judges*.

AMENDED JUDGMENT

This appeal from a judgment of the United States District Court for the District of Columbia was presented to the court and briefed and argued by

counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIRCUIT RULE 36(d). It is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed in part and reversed in part.

LogLogic, Inc., a data technology company, terminated Amy Maldonado from her position as a director of sales in November 2005. Maldonado brought suit against LogLogic, alleging it breached her compensation contract and the implied covenant of good faith and fair dealing applicable to the contract under California law. She also lodged a federal sex discrimination claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., alleging LogLogic terminated her because she was pregnant. The district court granted summary judgment on all claims in LogLogic's favor, finding no contract breach and determining that Maldonado failed to produce evidence by which a jury could reasonably conclude she was the victim of sex discrimination.

Maldonado now appeals. She argues her compensation contract entitles her to commissions for certain sales made while she was employed and that the covenant of good faith and fair dealing entitles her to commissions for sales completed after her termination and to stock options whose scheduled vesting post-dated her termination. She also contends that she produced evidence sufficient for a jury to find that LogLogic's asserted reason for terminating her was a pretext for sex discrimination.

Maldonado succeeds on one aspect of her breach of contract claim. She claims she closed a $10,000 deal with the United States Postal Service within her assigned sales territory in September 2005, and LogLogic does not contest this point. Maldonado's contract grants her a commission for "all sales [she] closes in [her] Sales Territory," and states that "[c]ommissions are earned on the date of the Eligible Sale." That language plainly entitles her to a commission for the September 2005 sale, and we reverse the district court's order with respect to this specific claim.

We affirm the district court, however, with respect to the other sales for which Maldonado claims credit. Maldonado did not close the February 2005 and October 2005 deals with JPMorgan Chase within her territory, and to the extent she was involved in either sale, there is no evidence she attempted to negotiate a commission split with the closing sales director as required by her contract. She is therefore not entitled to commissions for these two deals. She is also not entitled to commissions earned by others after her termination or to stock options scheduled to vest after her termination date. Maldonado argues that LogLogic deprived her of this compensation in violation of California's implied covenant of good faith and fair dealing when it terminated her. But that covenant only applies when an employer terminates an employee before conveying a "benefit to which the employee was clearly entitled." *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 353 n.18 (Cal. 2000). Maldonado was not "clearly entitled" to the compensation at issue. Her contract is clear that commissions are earned on the date of the sale and that the "VESTING OF SHARES . . . IS EARNED ONLY BY CONTINUING

AS A SERVICE PROVIDER AT THE WILL OF THE COMPANY." Under those terms, Maldonado cannot invoke the protection of the covenant.

Maldonado's sex discrimination claim also fails. When a Title VII defendant asserts a legitimate, non-discriminatory reason for a termination, a plaintiff wishing to survive summary judgment must produce evidence upon which a reasonable jury can find the defendant's reason to be a mere pretext for improper discrimination. *See Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). LogLogic identifies lackluster sales and Maldonado's failure to confirm a sales meeting with a client as the legitimate grounds for her firing. None of the evidence produced by Maldonado would permit a reasonable jury to question those grounds. She does not disprove that her sales fell below pre-determined targets or that she failed to confirm the sales meeting, does not demonstrate that LogLogic's motive for firing her was not based on these failings, and does not show that LogLogic treated any similarly situated employee more favorably.

For the foregoing reasons, we reverse the district court on the breach of contract issue pertaining to the September 2005 sale to the United States Postal Service and affirm in all other respects.

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
MaryAnne Lister
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2009

No. 09-7087

[Filed July 2, 2010]

AMY MALDONADO, APPELLANT	)
v.	)
LOGLOGIC, INC., APPELLEE	)

Appeal from the United States District Court
for the District of Columbia
(No. 1:07-cv-00066-RCL)

Before: GINSBURG, BROWN, and KAVANAUGH, *Circuit Judges*.

JUDGMENT

This appeal from a judgment of the United States District Court for the District of Columbia was presented to the court and briefed and argued by

counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIRCUIT RULE 36(d). It is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed in part and reversed in part.

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Maldonado now appeals. She argues her compensation contract entitles her to commissions for certain sales made while she was employed and that the covenant of good faith and fair dealing entitles her to commissions for sales completed after her termination and to stock options whose scheduled vesting post-dated her termination. She also contends that she produced evidence sufficient for a jury to find that LogLogic's asserted reason for terminating her was a pretext for sex discrimination.

Maldonado succeeds on one aspect of her breach of contract claim. She claims she closed a $10,000 deal with the United States Postal Service within her assigned sales territory in September 2005, and LogLogic does not contest this point. Maldonado's contract grants her a commission for "all sales [she] closes in [her] Sales Territory," and states that "[c]ommissions are earned on the date of the Eligible Sale." That language plainly entitles her to a commission for the September 2005 sale, and we reverse the district court's order with respect to this specific claim.

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AS A SERVICE PROVIDER AT THE WILL OF THE COMPANY." Under those terms, Maldonado cannot invoke the protection of the covenant.

Maldonado's sex discrimination claim also fails. When a Title VII defendant asserts a legitimate, non-discriminatory reason for a termination, a plaintiff wishing to survive summary judgment must produce evidence upon which a reasonable jury can find the defendant's reason to be a mere pretext for improper discrimination. *See Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). LogLogic identifies lackluster sales and Maldonado's failure to confirm a sales meeting with a client as the legitimate grounds for her firing. None of the evidence produced by Maldonado substantially undermines those grounds. She does not disprove that her sales fell below pre-determined targets or that she failed to confirm the sales meeting, does not demonstrate that LogLogic's motive for firing her was not based on these failings, and does not show that LogLogic treated similarly situated male employees more favorably. Because she does not identify any factual inaccuracy "accompanied by a suspicion of mendacity" in LogLogic's asserted grounds, Maldonado fails to carry her burden. *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998).

For the foregoing reasons, we reverse the district court on the breach of contract issue pertaining to the September 2005 sale to the United States Postal Service and affirm in all other respects.

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after

the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
MaryAnne Lister
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 07-00066 (RCL)

[Filed July 14, 2009]

AMY MALDONADO,)
)
Plaintiff,)
)
v.)
)
LOGLOGIC, INC.,)
)
Defendant.)
)

MEMORANDUM OPINION

This matter comes before the Court on defendant's Motion [40] for Summary Judgment. In sum, defendant LogLogic, Inc. ("LogLogic" or "defendant") terminated plaintiff Amy Maldonado ("Maldonado" or "plaintiff") from her employment at LogLogic. Maldonado now brings three[1] causes of action as a

[1] The parties have voluntarily agreed to dismiss Count II of plaintiff's Second Amended Complaint, her claim pursuant to the D.C. Wage Payment Act, D.C. Code § 32-1301, *et seq.*

result of this discharge: (1) that she was discriminated against because of her sex in violation of Title VII upon being terminated after announcing her pregnancy; (2) breach of contract; and (3) breach of the implied covenant of good faith and fair dealing. (Pl.'s Second Am. Compl., ¶ 25-53.)

Upon consideration of the defendant's motion, plaintiff's opposition, defendant's reply brief, the applicable law, and the entire record herein, the Court concludes that defendant's motion shall be granted. The Court's reasoning is set forth below.

LEGAL STANDARD

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Mills v. Winter*, 540 F. Supp. 2d 178, 183 (D.D.C. 2008) (Friedman, J.); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995).

To determine if there is any genuine issue of material fact, this Court is to view the record, facts, and all reasonable inferences in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157–59 (1970). A genuine issue of material fact is one which could affect the outcome of the litigation. *Celotex*, 477 U.S. at 322; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

DISCUSSION

1. Title VII Sex Discrimination

Plaintiff Maldonado alleges Title VII sex discrimination stemming from her discharge as an employee at LogLogic. Maldonado claims this discharge was prompted by the defendant coming to learn she was pregnant, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., as amended by the Civil Rights Act of 1991 ("Title VII") and the Pregnancy Discrimination Act. (Pl.'s Second Am. Compl. 1, ¶ 1.)

This Court will apply the shifting burdens test to determine whether plaintiff's discrimination claim should go to a jury. In the classic *McDonnell Douglas* test, the first burden is on the plaintiff to establish a *prima facie* case of discriminatory discharge. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973). Defendant argues that Maldonado's claim of discrimination should be dismissed because she cannot make out a *prima facie* case. Generally, a *prima facie* case of discriminatory discharge requires a showing that: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she was discharged; and (4) she was replaced by a person of equal or lesser ability who is outside the protected class. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-08, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993); *Park v. Washington Metro. Area Transit Auth.*, 892 F.Supp. 5, 10 (D.D.C. 1995), *aff'd*, 107 F.3d 924 (D.C. Cir. 1996).

However, plaintiff contends that an analysis as to whether she can establish a *prima facie* case is not

appropriate at the summary judgment stage. (Pl.'s Opp'n to Def.'s Mot. for Summ. J., 13.) Indeed,

> Lest there be any lingering uncertainty, we state the rule clearly: In a Title VII disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not *and should not* decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*.

Brady v. Office of the Sergeant of Arms, 520 F. 3d 490, 495 (D.C. Cir. 2008). LogLogic essentially maintains that it had a legitimate and non-discriminatory business reason for firing Maldonado, an at-will employee. (Reply Mem. in Supp. of Def.'s Mot. for Summ. J., 3.)

The central question this Court must determine in ruling on defendant's motion for summary judgment is whether "the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of...sex...." *Brady* 520 F. 3d at 495; *George v Leavitt* , 407 F.3d 405, 411 (D.C. Cir. 2005).

In sum, defendant LogLogic's asserted non-discriminatory reason for plaintiff's dismissal is that (1) her sales performance continued to be dismal after being placed on a Performance Improvement Plan ("PIP"); and (2) "she wasted her supervisor's time by having him fly across the country for a meeting with a

key customer that she failed to arrange and which never occurred." (Def.'s Mem., 1.) The burden will, then, shift to the plaintiff to provide sufficient evidence that defendant's proffered explanation is, in fact, pretext for sex discrimination. Maldonado has not met this burden.

As both the plaintiff and defendant concede, the Court should not make credibility determinations at this stage of the litigation. *Greenberg v. Food & Drug Admin.*, 803 F.3d 1213, 1216 (D.C. Cir. 1986).

Alan Hahn ("Hahn") was plaintiff's supervisor at LogLogic and LogLogic's Vice President of Sales. A trier of fact could not reasonably conclude that Hahn's proffered explanation for placing Maldonado on a PIP and ultimately firing her was pretext for discrimination. On the same day that Hahn informed plaintiff of her PIP, he also gave PIPs to two similarly underperforming male sales representatives. (Hahn Dep., 25; 63.) In addition, plaintiff was understandably placed on this PIP because her year-to-date bookings versus quota were only 7%. (Pl.'s Ex. 11.)

After Hahn sent the PIP to Maldonado, he received an e-mail from her on October 10, 2005, stating:

> Alan, The Performance Improvement Plan you have developed for me comes as a surprise considering recent discussions we've had about justifiable reasons that have caused the entire team's underperformance. And, it remarkably coincides with recent advisement to you of my pregnancy.

(Pl.'s Ex. 12.) Hahn responded to this e-mail the same day, writing, "I had not been informed by you or anyone else about your pregnancy and your email is the first information I have received in that regard." (*Id.*) He further stated that her pregnancy had no bearing on the PIP as her "performance to date...is not satisfactory." (*Id.*) Plaintiff responded to this email the next day and, instead of challenging Hahn's assertion that he did not know of her pregnancy prior to issuing the PIP, she only challenged the portion of Hahn's e-mail regarding his statement that they had numerous discussions about her poor sales performance. During deposition testimony, Maldonado later asserted that in the course of two phone calls between September 16 and September 28, 2005 she told Hahn she was pregnant. (Maldonado Dep. at 90-92.)

Hahn placed Maldonado on the PIP in early October, 2005, which required her to close $300,000 in sales $100,000 in each of October, November, and December of 2005. (Pl.'s Ex. 11.) Plaintiff was put on notice that, if her sales performance did not improve, she was at risk of dismissal. After plaintiff did not meet her sales goal stipulated by the PIP in October, she received an e-mail from Hahn that said, "[j]ust to be clear that there is no rollover to December and if you do not meeting [sic] the $200,000 in sales target for the month of November 2005 you will be terminated." (Pl.'s Ex. 17.)

On November 3, 2005, Maldonado and Hahn attended a meeting at the Department of Energy ("DOE"). Plaintiff states that Fabricio Fermin ("Fermin"), a Sales Engineer with LogLogic, told plaintiff that he scheduled a meeting for November 3, 2005 with several people at DOE, including its CIO,

Harry Hickson ("Hickson"). (Maldonado Decl., ¶ 8-9.) Hickson did not end up attending this meeting. Defendant maintains that Hahn specifically told Maldonado that he and LogLogic needed to meet with Hickson, and Hickson was the only reason Hahn was making the trip from Washington, D.C. to the DOE in California. Further, defendant maintains, "[w]hile Fermin leveraged his contacts to set up the meeting, Hahn still believed it was Plaintiff's responsibility to set up the meeting and get to the decision-makers." (Def.'s Mot. for Summ. J., 8.) Plaintiff was then fired after this, as "Hahn decided to terminate Plaintiff's employment based on her failure to confirm the meeting at DOE." (*Id.* at 9.)

Contrary to the defendant's assertion that Hahn told Maldonado to confirm Hickson's attendance at the meeting, and that Hickson was the only reason Hahn made the trip, plaintiff maintains that "[a]t no time before, during or after the October 28 conference call did Hahn tell Maldonado to confirm the meeting with DOE's CIO, or to confirm the attendance of the CIO at the meeting." (Pl.'s Opp'n to Def's Mot. for Summ. J., 16-17.) However, even taken to be true, this "does nothing to undercut *Hahn's expectations* and Ms. Maldonado's failure to meet those expectations...." (Reply Mem. in Support of Pl.'s Mot. for Summ. J., 4.) Plaintiff has not presented more than a mere colorable inference that the purported reason for plaintiff's dismissal her poor sales performance and her failure to confirm the meeting at DOE is pretext for discrimination.

Indeed, summary judgment may be granted if the evidence is merely colorable or not significantly probative. *Anderson*, 477 U.S. at 249-50. Despite an

apparent temporal connection between Hahn's issuance of the PIP and Maldonado's state of pregnancy, plaintiff has presented insufficient evidence to show that defendant's articulated reasoning was pretextual.

In deciding a motion for summary judgment, "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 248. Plaintiff essentially attempts to present two disputed issues of material fact relating to plaintiff's dismissal, including (1) whether Hahn knew Maldonado was pregnant prior to placing her on the PIP; and (2) whether Hahn "asked [Maldonado] to make sure that she called directly to the CIO's office and confirmed [sic] that there was a meeting, that we had a second point of confirmation that the meeting was going to happen...." (Hahn Dep. 111:10-112:4.)

In the Reply Memorandum in Support of Defendant's Motion for Summary Judgment, defendant appears to back away from the prior contention that Hahn specifically instructed Maldonado to confirm the particulars of the DOE meeting, stating, "[w]hether [Hahn] communicated that idea to Plaintiff does not prove or disprove the non-discriminatory nature of his expectation." (Reply Mem. in Support of Pl.'s Mot. for Summ. J., 5.) This is valid. Hahn may legitimately hold plaintiff responsible for ensuring Hickson's attendance at the meeting as plaintiff was the sales manager for the deal. No credible evidence has been presented to give rise to the conclusion that defendant's proffered explanation for Maldonado's discharge was mere pretext for sex

discrimination. Even though Fermin was apparently responsible for the logistics of the meeting, Hahn held Maldonado responsible because she (not Fermin) was the account's manager.

At the summary judgment stage, "a judge may not make credibility determinations, weigh the evidence, or draw inferences from the facts..." and the judge is to view all evidence in the light most favorable to the plaintiff. *George v. Leavitt*, 407 F.3d 405, 413 (D.C. Cir. 2005). Even viewed in the light most favorable to the plaintiff, a reasonable fact finder could not conclude defendant's legitimate and non-discriminatory business reason for plaintiff's dismissal was pretext for discrimination. Coupled with Maldonado's poor sales record and her failure to meet the first month's PIP goal, defendant's legitimate decision to fire plaintiff was non-discriminatory and there is no evidence of discriminatory intent.

Therefore, with regard to plaintiff's allegation of Title VII sex discrimination, defendant's motion for summary judgment shall be granted.

2. Breach of Contract

California law governs the terms of Maldonado's employment contract with LogLogic, as was recognized by this Court on December 5, 2007. (Mem. Op. [19] at 3.) Plaintiff's breach of contract claim alleges that "Maldonado did not receive commissions on three sales that closed within her territory in 2005." (Pl.'s Opp'n to Def.'s Mot. for Summ. J., 22-23.) However, the contractual LogLogic Sales Compensation Plan (the "Plan") expressly provides that a sales person will receive sales credit and commissions "for all sales

he/she closes in the Sales Territory." (Pl.'s Ex. 7, at 2.) Because Maldonado did not close these three sales within her territory, she is not entitled to sales commissions for the sales. Simply because the sales closed *within* plaintiff's territory does not entitle her to commissions on the sales she herself did not close.

Maldonado also argues that the Plan says commissions "must be split" if another sales person closes a sale within her territory. However, defendant is correct in that the express language of the Plan is to the contrary. The Plan states that "[i]n sales situations that overlap multiple territories, the affected salespersons are responsible for resolving any commission 'splits'" and that "[i]f the affected parties cannot resolve a split, the VP of Worldwide Sales will determine the commission split." (Pl.'s Ex. 7, at 1.) It is, therefore, left to the salespersons involved to discuss any commission splits. Maldonado did not do this. Further, Maldonado did not bring this to the attention of Hahn, the VP of Worldwide Sales, until after she was terminated at LogLogic.

Indeed, in the words of the defendant, "[t]he fact that Plaintiff either chose not to engage in negotiations with her fellow salesperson, or that Hahn did not choose to split the commissions is not something that can be challenged after the fact as breach of contract." (Reply Mem. in Supp. of Def.'s Mot. for Summ. J., 10.) Therefore, with regard to plaintiff's breach of contract claim, defendant's motion for summary judgment shall be granted.

3. Breach of the Covenant of Good Faith and Fair Dealing

The covenant of good faith and fair dealing, implied in virtually every contract, serves to guarantee "that neither party will do anything to frustrate the right of the other to receive the benefits of the [contractual] agreement." *Kuhn v. Dep't of Gen. Servs.*, 22 Cal. App. 4th 1627, 1637-38 (1994); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 683-84, 254 Cal. Rptr. 211, 765 P.2d 373 (1988).

In the instant case, plaintiff argues that her legitimate expectations were frustrated after being terminated "on bogus grounds one month before her option to purchase LogLogic stock would have vested, and one week after she conferred with [Hahn] on a dozen potential sales she was developing." (Pl.'s Opp. to Def.'s Mot. for Summ. J., 26.)

Defendant argues that the plaintiff cannot claim LogLogic breached the covenant of good faith and fair dealing by depriving her of potential *future* benefits of continued employment, in the form of future stock options that would have vested nearly a month after her discharge and the commission for potential sales she had not yet sold at the time of her discharge. This is a valid argument, as:

> Precisely because employment at will *allows* the employer freedom to terminate the relationship as it chooses, the employer does not frustrate the employee's contractual rights merely by doing so. In such a case, "the employee cannot complain about a deprivation of the benefits of continued employment, for the agreement never

> provided for a continuation of its benefits in the first instance." *Hejmadi v AMFAC, Inc.* (1988) 202 Cal. App. 3d 525, 547 [249 Cal. Rptr. 5].

Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 350, 8 P.3d 1089 (2000).

After plaintiff's discharge, her sales accounts were reassigned to Fermin and closed by Fermin. It would be specious and overly speculative to award the commissions to Maldonado. Similarly, the potential benefits of unvested stock options are speculative, indeterminate, and in all likelihood a minor benefit of continued employment. *Guz* further explains:

> ...[T]he covenant [of good faith and fair dealing] prevents a party from acting in bad faith to frustrate the contract's actual benefits. Thus, for example, the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned.

Guz, 24 Cal. 4th at 353, n.18. Commission for mere *potential* sales, and an unvested option to purchase LogLogic stock, are not contractual benefits to which Maldonado was "clearly entitled" at the time of her discharge.

Furthermore, insufficient disputed questions of fact exist from which a reasonable trier of fact could conclude that Hahn intended to frustrate plaintiff's legitimate expectations under her LogLogic employment contract. Discharging Maldonado one

month before her option to purchase LogLogic stock would have vested and before potential sales were finalized does not constitute an intentional frustration of the contractual rights of Maldonado's at-will employment. Therefore, summary judgment as to the plaintiff's claim of breach of the implied covenant of good faith and fair dealing shall be granted.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment will be granted in a separate order issued this date.

Signed by Royce C. Lamberth, Chief Judge, on July 14, 2009.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 07-00066 (RCL)

[Filed July 14, 2009]

AMY MALDONADO,)
Plaintiff,)
)
v.)
)
LOGLOGIC, INC.,)
Defendant.)
)

ORDER

Having considered the defendant's motion for summary judgment and the responsive filings thereto, and the record herein, it is for the reasons contained in the defendant's summary judgment motion and the accompanying Memorandum Opinion hereby

ORDERED that no genuine issue of material fact bars entry of judgment for defendant; and it is further

ORDERED that defendant's Motion [40] for Summary Judgment is GRANTED and plaintiff's claims are DISMISSED WITH PREJUDICE.

SO ORDERED.

Signed by Royce C. Lamberth, Chief Judge, on July 14, 2009.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 2009

No. 09-7087
1:07-cv-00066-RCL

[Filed September 1, 2010]

Amy Maldonado,	)
	)
Appellant	)
	)
v.	)
	)
LogLogic, Inc,	)
	)
Appellee	)
	)

BEFORE: Ginsburg, Brown, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing, it is

ORDERED that the petition be denied. It is

FURTHER ORDERED, on the court's own motion, that the judgment of the court issued on July 2, 2010, be amended as follows:

Delete the paragraph beginning with the sentence, "Maldonado's sex discrimination claim also fails." Insert in lieu thereof the following:

> Maldonado's sex discrimination claim also fails. When a Title VII defendant asserts a legitimate, non-discriminatory reason for a termination, a plaintiff wishing to survive summary judgment must produce evidence upon which a reasonable jury can find the defendant's reason to be a mere pretext for improper discrimination. *See Brady v. Office of the Sergeant at Arms*, 520 F.3d 490, 494 (D.C. Cir. 2008). LogLogic identifies lackluster sales and Maldonado's failure to confirm a sales meeting with a client as the legitimate grounds for her firing. None of the evidence produced by Maldonado would permit a reasonable jury to question those grounds. She does not disprove that her sales fell below pre-determined targets or that she failed to confirm the sales meeting, does not demonstrate that LogLogic's motive for firing her was not based on these failings, and does not show that LogLogic treated any similarly situated employee more favorably.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail

Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 2009

No. 09-7087
1:07-cv-00066-RCL

[Filed September 1, 2010]

Amy Maldonado,	)
	)
Appellant	)
	)
v.	)
	)
LogLogic, Inc,	)
	)
Appellee	)
	)

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

APPENDIX F

42 U.S.C. § 2000e: Definitions

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [42 USCS § 2000e-2(h)] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e-2: Unlawful employment practices

(a) Employer practice. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.